IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1250 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHARATSINH NARAYANSINH SARVAIYA

Versus

CHAUHAN MADHABHAI CHOTHABHAI

Appearance:

1. Civil Revision Application No. 1250 of 2001

MR PF ADHVARYU for Petitioner No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 03/04/2002

ORAL JUDGEMENT

Heard Mr. Adhvaryu, learned advocate for the petitioner - original plaintiff-decree holder. The challenge is in respect of order passed by the learned trial Judge below application Ex. 1 in regular Execution Application No. 13/98 dated 17th August, 2001, wherein, the learned Trial Judge had recorded that as the application for adjournment was submitted, was rejected

and when the matter was called out, plaintiff was not present and the court waited upto 5.30 p.m. inspite of that, the plaintiff has not remained present and accordingly, dismissed the said Execution Application.

2. Earlier, this Court has passed the following order :-

"Rule returnable on 4.12.2001. Direct service permitted."

Mr. Adhvaryu has accordingly taken me through the affidavit of service filed by the petitioner - Shri Bharatsinh Sarvaiya dated 29th November, 2001 to show that he had gone to effect the service on the respondent but the respondent has refused to accept the service of notice. In view of the affidavit filed by the petitioner, the respondent has refused to accept the service and under the Rule, refusal of service is a good service.

3. During the hearing, Mr. Adhvaryu while arguing the matter has taken me through the documents attached to the revision application and it is his contention that the learned trial Judge was not right in dismissing the execution application itself while considering the application for adjournment. It is submitted that the advocate for the plaintiff has submitted an application for adjournment in the proceeding for taking instruction to file reply on the commissioner's report as well as on an application Ex.40 and the learned Trial Judge has accordingly, in absence of plaintiff has dismissed the execution application as well as application for adjournment as per order dated 17th August, 2001. As found from the order, Ex.54 dated 17th August, 2001 was submitted through an advocate of the plaintiff in Execution Application No. 13/98 praying for time in filing reply of Ex.40 as well as reply to objection in respect of the Commissioner's report and the notice in respect of breach of stay is also pending for service to be effected on respondent and as the plaintiff is busy in domestic work and has gone out of Palitana, it is not possible for him to remain present in the court and accordingly, prayed for adjournment. The said application for adjournment dated 17.8.2001 was also shown to the defendant's advocate and the advocate for the defendant has endorsed objection as earlier two times the adjournment was taken by the plaintiff for filing objection in respect of the Commissioner's report and the plaintiff has not remained present and he objected for time.

4. The learned trial Judge below application Ex.54 has observed that when the matter was called out, plaintiff is not present and sufficient time was given for filing objection and has not tendered report and accordingly, in absence of plaintiff, application for adjournment as well as application for execution were rejected and accordingly, learned Trial Judge has also passed order below Ex. 1. It is true that, earlier the court has given time. However, once the application for adjournment was submitted through advocate and as the plaintiff has gone out of Palitana, the learned Judge ought to have granted time by observing that to give last chance the matter is adjourned and now, no further time is given and while rejecting the application for adjournment at Ex.54, the learned Judge has also passed order below Application Ex.1 i.e. on Execution Application No.13/98 and rejected the application Ex.1. Accordingly, order passed by learned trial Judge below applications Exs. 1 and 54 deserve to be quashed and set aside and the trial Court is directed to examine the case afresh and decide the same in accordance with law. Rule is made absolute in above terms with no order as to costs.

(D.K.Trivedi,J.)

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